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The Jurisprudence of the European Court of Human Rights: A Score Card for an Effective Enforcement of the Human Rights Regime

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Abstract
Europe has succeeded in principle, in moving from the stage of proclamation of inalienable Human Rights – a gesture of political intent, to that of their effective implementation. Despite a great beginning when the European Convention for the Protection of Human Rights and Fundamental Freedoms (E.C.H.R) was signed in 1956, the path to effective protection of Human Rights has been long and difficult even in Europe. The European Court of Human Rights established in 1959 was the first Independent International Tribunal dedicated to the protection of Human Rights. This article examines the jurisprudence of the European Court of Human Right as a panacea for an effective enforcement of the human rights regime and concludes that the European Courts of Human Rights jurisprudence reaches a good equilibrium on many matters, while on a few others, in the eyes of the present commentator, it could still be improved. Similarly, the court rather than divesting itself of its specific mistake in order to become a general court of cassation of the Council of Europe member states, have instead engaged in a middle way, assigning to itself the role of an essential milestone in the protection and constant development of that branch of law called 'Human Rights' and which embodies in some sort, worded general propositions and the essential political and legal commitments of the democratic state of Europe.

1.1 Introduction

The main trust of this article is to examine the jurisprudence of the European Court of Human Right and see whether it can act as a panacea for an effective enforcement of the human rights regime.

In Europe, it is generally accepted that Fundamental Rights limit the public power. Indeed such rights enshrine the ideal of the rule of law. This is, however, not only grand statements of intent but directly applicable.

Europe has succeeded in principle, in moving from the stage of proclamation of inalienable Human Rights – a gesture of political intent, to that of their effective implementation. Despite a great beginning when the European Convention for the Protection of Human Rights and Fundamental Freedoms (E.C.H.R) was signed in 1956, the path to effective protection of Human Rights has been long and difficult even in Europe. The European Court of Human Rights established in 1959 was the first Independent International Tribunal dedicated to the protection of Human Rights[1]. Yet decades passed before citizens of all of the member states of the Council of Europe could petition the court situate in Strasbourg, France, irrespective of whether the state in question had expressly recognized the right to this remedy[2]. Furthermore, it is only with the global political transformation of the past decade that the courts sphere of influence extended to include much of Eastern Europe.

According to the president of the court, the restructuring of the European Court of Human Rights carried out in 1998 was intended to cope with an increasing volume of applicants to speed up with the time taken to examine cases and to strengthen the judicial nature of the system[3].

An analysis of the jurisprudence of the European Court of Human Rights, on principles of fundamental rights will show a constitutive role in developing and to some extent giving more precision to the law while in some, it has failed.

This Article will therefore X – ray and make an anatomy of the jurisprudence of the court and suggestion would be made on how to ensure effectiveness of the court in the sphere of Human Rights.

2.1 An Overview of the European Court of Human Rights

The European Court of Human Rights was first established in 1959 under the European Convention on Human Rights of 1950 and was restructured in November 1998 when it became a Permanent Court with full time judges thereby replacing the then existing enforcement mechanism, which included the European Commission of Human Rights created in 1954[4]. The court is situated in the French city of Strasbourg. It is a Court of limited

[1] Karlsruhe – J.L; "Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe", (2000) 21 HRLJ No. 9 – 2 p. 333.
[2] Since the institutional reforms effected by Protocol No. 11 of the European Convention on Human Rights (full text in 15 HRLJ 86 (1994), The acceptance of the right of petition is no longer optional, but compulsory.
[3] President of the European Court on Human Right. "The volume of work is already daunting" (1999) 20 HRLT 114.
[4] See European Court of Human Rights, available at http://en.wikipedia.org/europeancourtofhumanrights, p.1. Accessed on

jurisdiction[1]. It may hear timely, inter – state and individual complaints alleging that a state party to the European Convention on Human Rights has violated one or more of the rights guaranteed by the Convention or one of its Protocols[2]. It hears cases from Countries which are bound by the Convention namely, all European nations except Belarus[3].

The court is composed of a number of judges equal to that of the contracting states or equal to the number of signatory parties, which currently stand at 47. The parliamentary assembly of the Council of Europe elects each judge in respect of a signatory party. There are no nationality requirements for judges (e.g. a Swiss national is elected in respect of Liechtenstein). Judges are assumed to be impartial arbiters rather than representatives of any country. The parliamentary assembly of the Council of Europe elects judges for a term of six years[4]. Elections for one half of the judges are held every three years[5]. The mandatory retirement age is pegged at 70[6].

The official language of the court is English and French. Under the rules of the court, the court is divided into five sections. The sections composition must reflect geographic and gender balance and take into account the different legal systems of the member states. Each section has a president and two of the section presidents serve as vice – president of the court. The sections are divided into chambers of seven judges assigned on the basis of rotation, with the section president and the national judge sitting in each case[7].

Complaints of violation by member states are filed in Strasbourg, France, and are assigned to a section. A committee of three judges, which may unanimously vote to strike any complaint without further examination, first hears each complaint. Once it passes the committee, the complaint is heard and decided by a full chamber. Decisions of great importance may be appealed to the grand chamber in serious question relating to interpretation of the Convention or the Protocols thereby or where the resolution of a question before it may have a result inconsistent with a judgment previously delivered by the court[8].

Any decision of the Court has the character of a recommendation and is therefore executed on the sole discretion of the affected member states[9].

It is the role committee of Ministers of the Council of Europe to supervise the execution of the court's judgment though it has no formal means of using force against member countries in order to comply. However the ultimate sanction of non – compliance is expulsion from the Council of Europe and thus becoming a "Pariah" state within Europe. Furthermore, the European Union takes a keen interest in the Convention and the court as well as its jurisprudence so would not look kindly upon any E.U. member state that did not fulfill its Convention obligations.

3.1 Assessment of the Jurisprudence of the European Court of Human Rights on Detention and Fair Trial Related Issues (Criminal)

3.1.1 Right to personal liberty (Habeas Corpus) and legality of detention[10]

According to the Convention and the courts jurisprudence, a deprivation of liberty must rest on:

i. A sufficient legal basis;
ii. The respect of procedural guarantees;
iii. A legitimate motive as set out in letter (a) – (f) of Article 5 paragraph 1 of the Convention.

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the 23/7/2012.

[1] See BBC News: Profile on European Court of Human Rights, available at http://news.bbc.co.uk/2/hi/europe/countryprofiles/4789300.stm, p.1. Accessed on the 15/9/2012.

[2] See Art. 33 and Art. 34 of the ECHR. While Art. 33 provides that any High contracting party to the convention and its protocols may refer any alleged breach of the provision by another High contracting party to the court, Art 34 states that the court may receive applications from any person, non- governmental organization or group of individuals claiming to be the victim of a violation of one of the High contracting parties of any of the rights guaranteed in the convention or its protocols.

[3] BBC News: *op cit* at p. 1.

[4] Shelton Dinah (etal), "Ensuring Justice with Deliberate Speed: Case Management in the European Court of Human Right and the United States Court of Appeals", (2000) 21 HRLJ p. 338.

[5] On the election of judges, see Hans Christian Kruger, "Selecting Judges for the New European Court of Human Rights" (1996) 17 HRLJ 401.

[6] Protocol II, Article 23(6) of the European Convention on Human Rights.

[7] The committees, chambers and Grand chambers of the court are foreseen by the Convention, Art 27.

[8] Rule 72 provides that: "In accordance with Article 30 of the Convention, where a case is pending before a chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question, before it might have a result inconsistent with a judgment previously delivered by the court, the chamber may at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand chamber, unless one of the parties to the case has objected in accordance with paragraph 2 of this rule. Reasons need not to be given for the decision to relinquish".

[9] ECHR. How the execution of judgments works, available at http://eehr.coe.int/echr/en/header/ther+court/execution/How+the+execution+of+judgment+works. Accessed on the 20/8/2012.

[10] Art. 5 ECHR.

As to sufficient legal basis, the court had in the past held that a law in the material sense (delegation of legislative powers to the executive) as well as non-written law (common law) might be sufficient[1].

The law must then be clear and understandable so that the individual is able to conform to his conduct to it[2]. The law must finally be accessible[3].

However, there have been no developments in the case law on this point. Its requirement seems however well settled in the public law of the Western European states. As opposed to the jurisprudence of other human rights bodies, the European Courts of Human Rights in Gangaram Panday Vs Suriname[4] stated thus:

> *"No one may be subjected to arrest or imprisonment for reasons and by methods which although classified as legal could be deemed to be incompatible with the respect for the fundamental rights of the individual because amongst other things, they are unreasonable, unforeseeable or lacking in proportionality"*[5].

As to the respect of procedural guarantees in case of deprivation, the European Court of Human Rights had indicated that the applicable municipal law and the Convention including general principles contained in the latter must not be arbitrary. Here the Courts have over the years by way of Renvoi Materiel[6] elevated the internal procedure to the status of international law within its own four corners.

As a matter of fact, the European Court of Human Rights has had cause to interpret and expand the provision of the European Convention on Human Rights as it relates to criminal matters admirably. Some of its cardinal judgments include:

a. Prompt Information on the Reason of Arrest[7]

In Murray Vs UK,[8] where on the court expanded on the rule of promptness of the reasons of arrest and laid down a new rule to the effect that information implied in the questions put to the accused may hold good if these questions give him a sufficient picture of the charges leveled on him. It must however be stressed here that the court had no occasion to rule on the promptness of such human rights. However the United Nations committee on Human Rights has held in the case of N. Fillastre Vs Bolivia[9], that 10 days since arrest and a fortiori 3 – 4 weeks as in the case of E. Morris Vs Jamaica[10] or 50 weeks as in the case of G. Campbell Vs Jamaica[11] were excessive under Article 9 (2) of the Convention on Civil and Political Rights.

b. Prompt presentation to judicial authority[12]

The Court has held that the reasonableness of time depends on the circumstances of the case and especially the difficulty of the investigations, the behaviours of the accused and the handling of the case by national authorities[13].

In the case of Brannigan & McBride V United Kingdom[14] the period of detention of 6 days, 14 hours and 4 days 6 hours under the Prevention of Terrorism Act were on their face held to be incompatible with the courts price jurisprudence. The court however admitted that the government had validly exercised its powers of derogation under Art. 15 of the Convention, thus there being no breach of Art.5 (3).

It is however argued that there is obviously a danger that the guarantees under Art. 5 (3) may become illusory if Art. 15 are too easily read on a specific exception available not only as to the whole Convention but particularly to do away with the requirements of Art. 5(3) while it may be necessary to give the states some exceptional powers. When facing crimes like terrorism, these powers can obviously only make sense only in states of democratic tradition and of deeply felt rule of law.

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[1] Sunday Time, case series A, No. 30 p. 31 Para 47.
[2] I*bid* at Para 49. A norm cannot be regarded as law unless if it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advise to foresee, to a degree that is reasonable in the circumstance the consequences which a given action may entail.
[3] Sunday Times, case series A, No. 30 p 30 p. 31 Para 49. "The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstance of the legal rules applicable to a given case".
[4] (1994) 15 HRLJ p. 168.
[5] There seems to be the assumptions that unlawful arrest may a fortiori also be qualified as arbitrary under Art. 7(3).
[6] As to the notion of "Renvoi Forme" and Renvoi Material", see Capotorti F, "Court General De Droit International Public", RCADI, Vol. 248 (1998) IV pp 221-222.
[7] Art. 5 (2) ECHR.
[8] (1994) 15 HRLJ p. 331.
[9] (1991) Communication No. 336/1988 A/47/40, P. 298.
[10] (1998) Communication No. 635/1975 A/53/40, P. 124.
[11] (1992) Communication No. 248/1987 A/47/40, P. 238.
[12] Art. 5 (3) ECHR.
[13] See Wemhoff case (1965) See A. 7, P. 26.
[14] (1993) 14 HRLJ 184 series A No. 258 B.

In Yagci & Sargun Vs Turkey[1], the accused complained that their detention pending trial had been excessively long. The court began by recalling that the national authorities have to display "special diligence" in the conduct of such proceedings bearing in mind that the persistence of a reasonable suspicion is a condition for the validity of continued detention but that after a certain time it is no longer sufficient on its own.
In Muller Vs France,[2] it was again the whole period of detention which was in issue. The court found that 4 years were excessive on the basis of two factors:

1. The applicant had admitted the offence thus simplifying the case; and
2. There had been many successive changes of judges showing a lack of proper organization for which the state was liable.

However, the court had in Quinn Vs France[3] held that a detention on remand for one year was legitimate as there had not been negligence of the authorities which had acted with diligence.

In Tanz Vs Spain,[4] the applicant had been detained or remanded for 3 years and 2 months. This detention was held to be justified by the real danger of absconding as the applicant had no link with Spain.

It is argued however that the European Court of Human Rights had no opportunity to elevate on the relative weight of the several reasons for detention on remand. The seriousness of the crime, probable social reaction and ordre public or the previous record of the accused is very material factors in appreciating the appropriateness of a release. Some of them are inextricably linked with prospective aspects, as the danger of new offences or the danger of flight. In the sphere of very serious crimes, social interest deserves stronger protection. The European Court of Human Rights have now displaced the focus from the question of the ability to justify detention on remand to another aspects; if such detention is ordered on account of collective interest, the state has to expedite proceedings according to the formula of special diligence.

c. Fair Trail Guarantees[5]

The European Court of Human Rights has tried as much as possible to set forth some general aspects of the right to fair trial under Article 6. The court dealt with the problem of freedom from self-incrimination**.** Generally, an accused or witness must be able to stay silent if there is danger to incriminate him by certain disclosures without incurring unfavorable references as to this guilt. In Funke Vs France,[6] the court reminded that this right covers all types of criminal proceedings. The Court held that;

> *"The special features of customs law cannot justify such an infringement of the right of any one charged with criminal offence ... to remain salient and not to contribute to incriminating himself"*

The court has succeeded in leaving the question of qualification of an offence being criminal not to rest squarely on the municipal law. The court has therefore given states a leeway subject to the limit of arbitrariness. Having done this, the court therefore concerns itself with substance of the measure rather than its formal classification.

d. Right to Personal Participation in the Trial or an Appeal

The court has held that a trial without the presence of the accused is in principle incompatible with Article 6[7]. The court permits hearing in absentia if the state has acted diligently but unsuccessfully to give the accused effective notice of the hearing[8]. Where there is a trail in absentia, the court permits or gives an opportunity for the convicted to reopen the trial[9].

The court has indeed taken the concept of waiver of personal participation in trial to a higher level. Thus in the case of Zana Vs Turkey[10], the Turkish authorities had claimed that the accused had waived his right of personal attendance inter – alia because he insisted in addressing the court in Kurdish. The European Court of Human Rights held that the fact that the accused wanted to raise procedural objections and wished to address the court in Kurdish could not be constructed as an implicit waiver of his right of attendance. Such a waiver could only be established by unequivocal facts. As imprisonment was at stake, the trial could not be fair without a direct assessment of the applicants evidence given in person thus there had been a breach of Article 6.

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[1] (1995) 16 HRLR 286 Series A No. 319.
[2] (1997) Rep. No. 32 pp. 390-391 Paras 78-79.
[3] (1995) Series A No. 311, P. 20 Para 56.
[4] (1995) Series A No. 321, pp. 20 – 22 Paras 67, 74 & 76.
[5] Art. 6 ECHR.
[6] (1993) Series A. No. 256, A. P. 44.
[7] See Colozza Case (1983) Series A No. 89, P. 14 Para 27; Ekbatani Case (1988) Series A. No. 134, p. 12 Para 25.
[8] F.C.B. Vs ITALY (1991) HRLJ 369.
[9] Colozza Case, *op cit* at Para 29.
[10] (1997) Rep. VII No. 57 p. 2551 Paras 70-71.

e. Right to a Decision within a Reasonable Time

The European Court of Human Rights have developed and expounded four criteria for appreciating if time is reasonable in the circumstances viz:

(i) The breadth and complexity of the case e.g. if widespread financial criminality is involved.
(ii) The handling of the case by the state organs i.e. did those organs always act reasonably quickly when it comes up to them to carry the case on?
(iii) The behaviours of the accused i.e. did he use dilatory tactics?
(iv) The importance of the end of the procedure in the personal situation of the applicant.

To this end, the European Court of Human Rights held in Boddaert Vs Belgium case[1] as follows:

> *"The reasonable time requirement has to be balanced against the interest of proper administration of justice"*

The court has also persistently refused to spare contracting states who breached the reasonable time concept encourage under Article 6 especially in relation to states who have a bad organization of state organs.

Thus in the case of Mansur Vs Turkey[2], proceedings lasted more than eight years in part because they were strangely split in different courts which caused complications while reports were not transmitted diligently amongst these courts. In Philis Vs Greece No 2[3], the proceedings lasted for 5 years and 2 months, which was due to excessive case load of the courts. The European Court of Human Rights held that Article 6 had been breached since it;

> *"Impose on contracting states the duty to organize their judicial systems in such a way that their Court can meet each of its requirements, including the obligation to hear cases within a reasonable time".*

f. Presumption of Innocence

The General rule common to almost everyone is that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law[4]. The court has made important pronouncements in this area which has taken the presumption of innocent to another level. In the case of Allenet De Ribemont Vs France[5], the applicant complained of statements as to his guilt made in the media by the Minister of the Interior and the senior police officers immediately after the crime. The court had thus to consider the subject on whom the duty embodies and the principle applied. It considered that for Article 6 (2) to be effective, it must not only cover acts of the judiciary but also of other public authorities. In the present case, high public authorities made the statements on the media in direct link with the judicial investigation and without any qualification or reservation and thus held that this amounts to a declaration of guilt and a breach of Article 6 (2).

The court has however disallowed a forensic expert to start work on the hypothesis of guilt when writing his medical report. This aspect was in issue in the case of Bernard Vs France[6]. According to the court, the specialists appointed had logically started from the working hypothesis that the applicant had committed the crime he was charged with. The accused and his lawyer had all the opportunities to make observations; such a course according to the court was not compatible with Article 6 (2).

g. Right to Call and Cross Examine a Witness or Witnesses

The European Court of Human Rights has risen to the occasion in this area for the purpose of safeguarding the guarantees of fair trial.

A pertinent problem may relate to anonymous witnesses in general. In **Saidi Vs France[7],** the applicant had been convicted on the basis of testimony of witnesses who were not confronted by him at the trial. The court held that such unconfirmed testimony constituted the sole basis for the conviction and thus there had not been a fair trial.

4.1 Expansion of the Frontiers of Human Rights by the European Court of Human Rights

a. Expansion on Privacy Protection.

The European Court of Human Rights in the case of Copland Vs United Kingdom[8] expanded the basis and extent of protection of personal data in a variety of settings including the work place. In this case Copland alleged that the College Deputy Principal monitored her e – mail and telephone conversations to discover

[1] (1992) Series A No. 235 D P. 82-3 Para 39.
[2] (1995) Series A No. 319 – B PP 52 – 53, Para 78, 80-85.
[3] (1997) Reps. VII No. 57, PP 2552-2553 Paras 78, 80-85.
[4] See e.g. Salabiaku's case (1988) Series A. No. 141 B. PP 14-18 Paras 26.
[5] (1995) Series A No. 308 PP. 16-17 Paras 35-36, 41.
[6] (1998) Rep 11. No. 70 p. 880 Paras 38-41.
[7] (1993) Series A No. 26 C. P. 57 Para 144.
[8] 62617/00 (2007) ECHR 253 decided on the 3rd of April, 2007.

whether she was making improper use of college facilities for personal purposes.

The European Court of Human Rights found that on the party's representations concerning the intrusiveness and duration of the monitoring differed but the court accepted the U.K Government's position for the purpose of deciding the case. According to the Government, the telephone monitoring was limited to analyzing "college telephone bills showing telephone numbers called, the dates and times of the calls and their length of cost and lasted for a few months in late 1999". The Government claimed that the internet monitoring involved analyzing "the web sites visited", the times and dates of the visits of the web sites and then duration in October and November 1999.

The court held that the monitoring violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that:

> *"Everyone has the right to respect of his private and family life, his home and his correspondence"*[1]

The European Court of Human Rights reasoning is as follows:

(i) Firstly, the E.C.H.R concluded that telephone calls from business premises are prima-facie covered by notions of private life and correspondence. The fact that such calls occurred in the office and at least in theory, were business related was irrelevant. Under the E.C.H.R ruling, business e – mail and telephone calls affect "private life" and many contain "personal information" protected by human rights and presumably, data protection law.

(ii) Secondly, the E.C.H.R found that even if the telephone monitoring was limited to the date and length of telephone conversation, and the numbers dialed, the monitoring still gave rise to a cause of action under Article 8.

(iii) Thirdly, the E.C.H.R noted that the college argument that it legitimately obtained information about the telephone calls in the form of telephone bills posed no bar to finding that the monitoring violated Article 8. The E.C.H.R found that it was irrelevant that the date held by the college were not disclosed or used against the applicant in disciplinary or other proceedings.

(iv) Fourthly, the E.C.H.R concluded that, in the absence of any warning that her telephone calls and e – mail could be monitored, Copland has a "reasonable expectation" that they would not be. Even in the absence of applicable National Data Protection Law, Article 8 of the Convention presumes that workplace communications will not be monitored.

(v) Finally, the E.C.H.R stressed that Article 8 requires that monitoring must be in accordance with the law.

In the case of public authorities, Article 8(2)[2] mandates that monitoring must be both "in accordance with the law" and "necessary in a democratic society."

According to the E.C.H.R, this provision requires that the terms under which monitoring may be carried out be explicitly stated in the law and that those terms be compatible with the "rule of law" which means that the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which the conditions on which authorities are empowered to resort to any such measures. The U.K argument that statutory law empowered the college to do anything necessary or expedient to providing higher education was insufficient in the absence of law or regulation specially regulating telephone and internet monitoring by employers. The college monitoring of Copland could not have been in accordance with the law.

It is however argued by the present writer that under the national laws implementing two E.U privacy directives,[3] the collection, use, storage and transmission of personal data are subject of the world's most extensive legal protection. National Data Commissioners supported by European Court regard virtually all data about employees as "personal data" subject to the protection of E.U directives and National Data Protection Laws.

The working party – the group of National Data Protection Commissioners created by Article 29 of the 1995 Data Protection Directive and charged with its interpretation has concluded that:

> *"There should no longer be any doubt that, data protection requirements apply to the monitoring and surveillance of workers whether in terms of email use, internet access, video cameras or location data*[4].

In the United States of America, employees monitoring has become increasingly legally required to protect trade secrets, avoid liability for workplace discrimination, guard against information security breaches,

[1] European Convention for the Protection of Human Rights and Fundamental Rights, as amended by Protocol No. 11, Rome 4 X I. 1950.
[2] *Ibid.*
[3] Directives 95/46/EC of the European Parliament and the council on the protection of individuals with regard to the processing of personal data on the free movement of such Data, (1995) O. J. (L281) 95; Directive 2002/58/EC of the European Parliament and Council of 12 July 2002 on privacy and electronic communication 2002 O. J. (L. 201) 37.
[4] Article 29 Data Protection Working Party, opinion 8/2001 on the processing of Personal Data in the employment context, Sept, 13, 2001 (5062/01/EN/Final WP 48) at 24.

account for communication expenditures and compliance with the Federal document retention requirement.

Thence, the decision of the E.C.H.R in Copland's case would be sobering for business and other organizations operating in Europe and especially challenging to multinational entities. The holding of the E.C.H.R that telephone calls and e – mail from a business falls within the Conventions notions of "private life" and are subject to a reasonable expectation of privacy would likely come as a surprise to many employers. Viewed against this backdrop, Copland reliance on and application of Article 8 of the Convention to employer monitoring of telephone calls and e – mail but not their contents are important but marginal extensions of European workplace privacy law.

More broadly, the case and the decision of the E.C.H.R is also a potent reminder of how far European law has moved in the direction of workplace privacy and how great a challenge this movement poses for the United States and multinational entities.

5.1 Some Notable Decisions Delivered By the European Court of Human Rights Aimed At Developing the Convention Law

In December 1977 the court ruled that Government of the United Kingdom was guilty of inhuman and degrading treatment of men interned without trial by the court, following a case brought by the Republic of Ireland [1]

The court found that while their internment was a violation of the Convention rights, it was justifiable in the circumstances; it however ruled that the practice of the five techniques and the practice of beating prisoners constituted inhuman and degrading punishment in violation of the Convention although not torture. It was the contention of the United Kingdom that Irish litigation was pointless, relying on principles of international law accepted by the I.C.J. However the E.C.H.R held that even though the U.K had already made these decisions and undertaking, the case could still be considered, since ruling on it would serve the purpose of the development of the Convention law.[2]

In 1980, the court ruled out the foetal right to sue the mother carrying the fetus in the case of Paton Vs United Kingdom wherein it was discovered that the life of fetus is "intimately connected with, and cannot be regarded in isolation from the life of the pregnant woman".

In 2006, the court denied admissibility of the application of former USSR secret service operative convicted in Estonia for Stalinist crimes against humanity after Estonia became independent in 1991. For the first time since the Russian Military invaded Chechnya in 1991, the court agreed to hear cases of Human Rights abuse brought forward by Chechen civilians against Russia.

In June 21st, 2007, the court ruled that Russia was responsible for the killing of four Chechens. Russia was found guilty on the basis of eye witnesses' description, the vehicles the perpetrators drove and their ability to travel during restricted hours[3].

6.1 Assessment of the European Court of Human Rights Judgment on Highly Controversial Issues Capable of Torching on National Security of European Countries.

a. The European Court of Human Right Confirmation that Lesbians, Gay and Bisexual Individuals Eligibility to Adopt Children.

On the 22nd of January 2008, the Grand Chamber of the European Court of Human Rights delivered its judgment in a the case of E.B Vs France and held that exclusion of individual from the application process for adoption of children simply because of their sexual orientation is discriminatory and is in breach of the European Convention on Human Rights[4]. In this case, Mrs. E.B is a lesbian nursery school teacher who has been living with another woman since 1990. She applied for approval as a possible adoptive parent in February 1998, but her application was rejected essentially because of her sexual orientation. In June 2002, the highest administrative court in France upheld the rejection of her application. The FIDH Federation International Des Ligues Des De I' Homme (FIDH), Association Des Parents et Futures Lesbians (APGL) and the British Association for adaptation and fostering (BAAF) were granted permission to take part in the proceedings as third parties.

In France, no one has an automatic right to adopt a child. What the European Court of Human Rights held is that the European Countries can no longer justify exclusion of lesbians, gays and bisexual individuals from applying for child adoption. The court with this judgment has now established the principle that ILGA – EUROPE has long fought for each individual should be treated on the basis of his or her individual merit as a potential parent when applying to adopt a child. That the sexual orientation of the applicants is irrelevant and

[1] Case No. 5310/71.
[2] Search ECHR Data base (http://cmlskp.echr.coe.int/tkp197search.aspo?skin=hudoc-en) "In the case of Ireland Vs the United Kingdom" (No. 5310/71).
[3] [3] "Russia Ruled Responsible for Killing of Four Children, 21 June 2007. Available at (http://www.rferl.org/featuresarticle/2007/06/28d6e008-9793-476b-be09-22nd4592d7286.html). Accessed on 15th June 2012.
[4] [4] See http://.www.ilga-europe.org/European/news/european, Court of human rights says lesbians, gay and bisexual individuals are eligible to adopt children. Accessed on the 2nd of June, 2012.

cannot be used to exclude them from the possibility of adopting a child. That it is in the best interest of children in Europe and outside Europe that no potential adoptive parent be excluded from consideration for an irrelevant and discriminatory reason.

The E.C.H.R has similarly ruled in Smith & Grady Vs United Kingdom[1], that Lesbians, Gay and Bi – Sexual individuals (LGBT) people must be allowed to serve in the armed forces.

i. Judicial Contradictions?

It may well appear that as a result of the bulk of cases before the European Court of Human Rights, case law consistency have been an apparent problem to the extent that they are not guided by precedents or obviously close their eyes to it.

Only in 2002, in a very similar case of Freete Vs France, the European Court of Human Rights ruled by 4 votes to 3 that the exclusion of a gay man from the application process for adoption of children because of his sexual orientation did not violate the Convention.

One then wonders why the case of E.B. Vs France can be any different. This explains the over joyous mode of the Lesbians, Gays and Bisexual individuals of the outcome of the European Court of Human Rights decision in the case of E.B Vs France which gives them eligibility to adopt children.

Patricia Prendiville, Executive Director of ILGA Europe said:

> *"We welcome today's judgment of the European Court of Human Rights. This is a significant change in the Courts approach towards the interpretation of the rights of the LGBT people under the European Convention of Human Rights. Today the court finally established a principle that administrative officials cannot discriminate against an individual on the basis of her/his sexual orientation in the process of applying to adopt a child"*[2]

It is however argued that this decision of the European Court of Human Rights is capable or has the potentiality of triggering anti – social vices in the society. Most countries in the world today look upon lesbianism, homosexuality as social vices capable of creating a rot in the society especially as it relates to the younger ones. In almost every society in the world in adoption cases, the overwhelming consideration is the welfare of the child. The welfare of the child here relates not only meeting the financial needs of the child but equally the moral upbringing of the child. Moral upbringing of a child is tied to the morality of the parents since that is what is going to be impacted on the child. Thence, if the proposed adopter is a gay or a lesbian, then the tendency of the child been brought up the same way as the adopter is high which explains why must countries in Europe denies such parties the right of adoption.

The above decision of the European Court of Human Rights is actually a set back to the steps taken by most European countries in trying to curb the rising incidence of homosexuals and lesbians and this way very well mean a license for their continued indulgence in this despicable act of immorality thence affecting what the writer believes to be the "moral security" of most European countries.

b. The Courts Confirmation of the Headscarf Ban in Turkey.

Decisions are often made or churn out by the European Court of Human Rights losing sight of its implication on national security. A clear out example lies in the area of religion. Some of the courts judgments are highly political in nature capable of affecting the national security of the contracting parties.

Turkey for instance is a secular republic albeit overwhelmingly Muslims and a signatory to the European Convention on Human Rights. In 2005, the European Court of Human Rights backed Turkish Islamic headscarf ban in Universities.

Leyla Salin had brought the case in 1998 after being excluded from class at Istanbul University. Leyla had argued that the state ban violated her right to education and discriminated against her. Amongst the rationale behind the European Court of Human Rights ruling was the fact that:

> *"The Court did not lose sight of the fact that there were extremist political movement in Turkey which sought to impose on society as a whole their religion symbols and conception of a society founded on religious precepts."*[3]

It is however argued that the political nature of this decision stems out from the fact that, the European Court of Human Rights feared the enormous implication of ruling otherwise for a mainly Muslim country and which verdict will have a major impact on more than 1,000 other women from Turkey who had filed similar applications. The headscarf ban which was imposed and to apply to all Turkish Universities, state or private, has

[1] *Ibid* at page 1.
[2] *Ibid.*
[3] Courts Backs Turkish Headscarf Ban, available at http://news.bbc.co.uk/2/hi/europe/4424776.stm at p. 1. Accessed on the 20th of May 2012.

made students in Turkey to be faced with an impossible dilemma to either ignore their religious beliefs or to go without higher education. Such a country without potential elite poses a threat to the security of such a country and indeed other nations of the world.

i. Taking Freedom of Religion to Greater Heights?

In the case of Kokkinaski Vs Greece,[1] Minos Kokkinakis, one of the Jehovah witness was arrested more than 60 times, summoned to court 18 times, and spent six years in prison as a conscientious objector and simply for speaking with others about his belief. The European Court of Human Rights held amongst others that:

> *"... Freedom to manifest ones religion ... includes in principle the right to try to convince one's neighbor ..."*

Mr. Kokkinakis conviction was overturned and Greece was ordered to pay damages and courts cost.

In Monoussakis & Ords Vs Greece[2], the European Court of Human Rights declared thus:

> *"... The right to freedom of religion as guaranteed under the convention excludes any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs are legitimate ..."*

When one balances this decision with the Courts ruling in the headscarf ban in Turkey, a manifest threat to security can be triggered off. An apparent judgment of the court that is capable of affecting the national security of contracting states is the ruling of the court in 2003 and 2004 that: *"Shariah is incompatible with the fundamental principles of democracy because the Shariah rules of inheritance, women's right and religious freedom violates human rights as established in the European Convention on Human Rights"*[3].

7.1 Conclusion / Recommendations

The European Court of Human Rights is faced with the formidable hurdles as it has sought to integrate new member states and their judges, clean up cases remaining from the former system, deal with a raising case load and develop new procedures.

The long sojourn though the European Court of Human Rights jurisprudence reveals a picture of constant efforts to reach the most satisfactory equilibrium between the concurring interests at stake. The court, by its very nature, is under diffuse and hidden but not less tangible – danger of privileging too much one side of the coin; that of freedom and rights of the individuals. This is so because, it is a specialized court. It deals only with human rights. The point here must be stressed that any person or organ permanently concerned with only one aspect of reality develops a particular relationship with attachment to that matter. He tends to over emphasize it. He tends to lose sight, be it only slightly and unconsciously of the other aspects and interest in human relationships. For one thing should never be forgotten even if it constantly is; for each right granted to one subject, rights and freedoms of others are to be limited. Human Rights should not be extracted from that complex interplay viewed from this perspective.

The European Courts of Human Rights jurisprudence reaches a good equilibrium on many matters, while on a few others, in the eyes of the present commentator, it could still be improved. But what must mainly be pointed out is that the general approach of the court to its judicial role has much to be recommended.

The Court could have engaged an approach of divesting itself of its specific mistake in order to become a general court of cassation of the Council of Europe member states. Instead the court engaged in a middle way, assigning to itself the role of an essential milestone in the protection but also in the constant development of that branch of law called 'Human Rights' and which embodies in some sort, worded general propositions and the essential political and legal commitments of the democratic state of Europe.

At the end of 2007 alone, some 103,000 cases were pending before the European Court of Human Rights. Given the explosive case load and despite the various measures taken to act on it, the court is in danger of collapsing. To enable it to perform its essential functions, the court should be relieved of cases which are manifestly inadmissible or repetitive.

[1] Strasbourg 3/1992/348/421, of 25th May 1993.
[2] Strasbourg 59/1995/565/651 of 26th Sept, 1996.
[3] http://www.echr.coe.int/eng/press/2003/feb/refahportissgcjugdment.htm. Accessed on the 21st of July 2014.

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